

## Form 15CB

### **Applicability of TDS on Commission paid to Overseas Agents**

CBDT had issued circular no. 786 dated 23<sup>rd</sup> July, 2000 whereby commission paid to non-residents from tax in India was exempted from tax. Subsequently, it withdrew this circular on 22<sup>nd</sup> October, 2009 which led to the confusion as to Taxability of Commission paid overseas to non-residents.

In this discussion, we have discussed the current position with respect to tax deduction of source on commission payments overseas to non-residents.

Commission paid to Non-resident can be categorised into following two types:

1. Commission for Commercial Service; and
2. Commission for Technical Service.

Let us discuss each category in detail.

#### **1. Commission for Commercial Service**

##### **(i) Taxability of Commission when Accrues in India or Paid or Received in India**

The above category of commission is taxable in India under Domestic Law only if:

- Income accrues to non-residents in India, or
- Income is received by non-residents in India, or
- Non-residents is having business connection in India under Sec 9(1)(i), or
- Non-resident is having source of Income in India

If any one of the above conditions is satisfied, commission becomes taxable in India as the Indian income under the Indian Income Tax Act, 1961. Hence, commission paid to such agent becomes taxable in India under the Income Tax Act, 1961.

Please note that the benefit of DTAA can be availed by the deductee.

##### **(ii) Taxability of Commission when not Accrued in India or Paid or Received in India**

In the case of above category of commission, Double Taxation Avoidance Agreement (DTAA) comes into play. It means that provisions of DTAA with that country shall apply.

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Commission paid to non-resident is regarded as business profits as referred under Article 7 of the DTAA. Business profits are taxable in India only if the non-resident agent has Permanent Establishment (PE), in India as is specified under Article 5 of the DTAA.

Normally, non-residents do not have PE in India. Hence, it is not taxable in India.

## **Conclusion**

Commission earned by non-resident would not be taxable in India if all services by the non-resident are rendered outside India and non-resident do not have business connection in India as per Sec 9(1)(i) besides the income being not received in India. If it is taxable under the Indian Law, we shall have to claim the benefit of DTAA.

## **2. Commission for Technical Services**

Hon'ble Delhi ITAT in the case of Adidas Sourcing Limited (ITA/5300/Del/2010), held that commission is in the nature of Technical Service, if some sort of managerial, technical or consultancy services have been rendered.

If the above condition is satisfied, then taxability is governed by the provisions relating to Fee for Technical Services (FTS). We shall discuss it in our next newsletter.

Documents to be taken by CA for Issuing 15CB:

- Copy of Invoice or Contract;
- No PE Declaration from Exporter;
- Tax Residency Certificate (TRC) of non-resident.
- Form 10F if all the prescribed details are not mentioned in TRC.

Rate of Tax will be 40% in case of Company or 30% in other cases. Surcharge, EC and SHEC to be added.

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